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No. 538

In the Supreme Court of the United States

OCTOBER TERM, 1960

HERMAN L. R. EMMET, JR., ET AL., PETITIONERS

v.

SUMNER G. WHITTIER, ADMINISTRATOR OF VETERANS AFFAIRS, ET AL.

JAMES A. DEERING, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ROBERT H. MABBUTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court granting petitioner Emmet's motion for a preliminary injunction

(R. 89–93)[1] is reported at 164 F. Supp. 563. The district court's findings of fact, conclusions of law and judgment in petitioners' consolidated cases appear at R. 146–165. The opinion of the court of appeals (Pet. 1a–14a) is reported at 281 F. 2d 24.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1960. A petition for rehearing en banc was denied on September 16, 1960. The petition for a writ of certiorari was filed on November 22, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 28 U.S.C. 2101(c).

QUESTION PRESENTED

Whether the court of appeals correctly held that petitioners' counsel were not entitled to collect fees from some 8,400 veterans who were not their clients or parties of record at any stage of the proceedings below.

STATUTE INVOLVED

Public Law 85–586, 72 Stat. 487 (Aug. 1, 1958) provides:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Administrator of Veterans' Affairs is hereby authorized to make refunds, without interest, which are due on account of amounts collected by the United States Government by offset or otherwise from persons who made valid application for and were legally entitled

[1] "R." refers to the joint appendix in the court of appeals.

to the protection of article IV of the Soldiers' and Sailors' Civil Relief Act of 1940, as it existed prior to the amendments of October 6, 1942. No refund shall be made pursuant to this Act unless application therefor is made to the Veterans' Administration, within two years after the date of enactment of this Act and refund hereunder shall not be denied by reason of any other statutory time limitations, judgments heretofore rendered, or any other technical defense.

SEC. 2. The Soldiers' and Sailors' Civil Relief Fund may be used by the Veterans' Administration for making refunds pursuant to this Act and there is hereby authorized to be appropriated such additional sums as may be necessary to carry out the purpose of this Act.

STATEMENT

1. *The Plesha decision and its relation to the instant actions.* *United States* v. *Plesha*, 352 U.S. 202, involved the question whether three veterans (Plesha, Mabbutt and Kern) covered by Article IV of the Soldiers' and Sailors' Civil Relief Act [2] prior to its 1942 amendments [3] were obligated to reimburse the Government for premiums the Veterans Administration had paid, on behalf of the servicemen, to private life insurance companies in order to keep the servicemen's policies from lapsing. This Court, on January 14, 1957, held in *Plesha* that the veterans were not so obligated because their premium payments had been guaranteed

[2] Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1183, 50 U.S.C. App. (1940 ed.) 510-554.

[3] Section 406, as amended by 56 Stat. 775.

prior to the 1942 amendment expressly requiring reimbursement. Accordingly, the Court affirmed the decision of the court of appeals[4] ordering the district court to enter judgment against the United States for the amounts earlier withheld by the Government from National Service Life Insurance dividends due the three veterans.

However, the three plaintiffs in *Plesha* did not move the district court to enter the judgment which they had sought and obtained from the Court. Instead, they relied apparently on the three present actions, filed shortly before the Court granted certiorari in *Plesha*, in which they had intervened prior to the Court's decision.[5] These actions, filed on behalf of the named plaintiffs and others "similarly situated", sought to raise the identical issue presented in *Plesha*. They also demanded: (1) refund of the dividends and benefits withheld, (2) interest on the amounts withheld and (3) litigation costs and attorneys' fees to be deducted from the total amount awarded the named plaintiffs and others similarly situated. Petitioner Emmet pursued these objectives in an action for mandatory relief filed in the District of Columbia against the Administrator of Veterans Affairs and other named officials (R. 7–14). Petitioners Mabbutt and Johnson relied on both the National Service Life

[4] 227 F. 2d 624, 625, 629 (C.A. 9).

[5] See S. Rept. 1862, 85th Cong., 2d Sess., p. 9; H. Rept. No. 1491, 85th Cong., 2d Sess., p. 8. Plesha and Mabbutt intervened in the instant *Emmet* case. However, Kern, the third veteran entitled to judgment under this Court's decision neither obtained a judgment nor intervened. He has been paid 90% of his refund along with the thousands of other veterans who were not parties to *Plesha* or to the present suits.

Insurance Act and the Tucker Act as the means of obtaining refunds with interest and fees in their suit filed in the Northern District of California (R. 184–88). Petitioner Deering invoked the same two Acts as a basis for jurisdiction in his suit filed in the Southern District of New York (R. 167–172).

2. *Governmental Action after Plesha.* Immediately after the Court's decision in *Plesha*, the Veterans Administration (V.A.) proposed to make refunds to over 8,400 veterans from whom collections had earlier been effected by the Government to reimburse itself for its payments of premiums to the private life insurance companies. It was estimated that more than $1,640,000 had been collected from these veterans.[6]

The V.A. offered to refund the entire amount to all veterans by administrative action without awaiting the filing of claims, except where the collection had resulted from a final judgment. However, the agency's plan was rejected on June 24, 1957, by the Comptroller General on the ground that payment of the refunds would require Congressional action. Letter opinion of June 24, 1957, set forth in 36 C. G. 825; H. Rept. No. 1491, 85th Cong., 2d Sess., pp. 9–12; S. Rept. No. 1862, 85th Cong., 2d Sess., pp. 10–13.

Accordingly, in July 1957, six months after the *Plesha* decision, the V.A. submitted a bill to Congress

[6] About $960,000 had been collected by offset against National Service Life Insurance dividends, $65,000 by offset against disability compensation, and $22,000 by offset against other gratuitous benefits; almost $600,000 was received in cash payments upon demand by letters to veterans and $2,000 was paid as a result of final judgments (R. 111–112, 114, 147).

to authorize the Administration to pay the refunds (R. 74–75, 126–135; Hearings before Subcommittees of the House Appropriations Committee on Supplemental Appropriation Bill, 1958, 85th Cong., 1st Sess., pp. 708–712). The only objections to this proposed legislation were those urged on the Congress by Butler, Koehler & Tausig, the law firm involved in the *Emmet* case (then pending). The attorneys urged that Congress should permit recovery by judgment in the class suits and that it was "unwise and unnecessary" to appropriate funds (R. 135–140; Hearings, pp. 734–736). By its report on August 6, 1957, the House Committee on Appropriations recommended that the matter of the refunds should first be referred to the legislative committees (H. Rept. No. 1009, 85th Cong., 1st Sess., p. 31).

In the same session of Congress, H.R. 9369 was introduced on August 20, 1957, to accomplish the same objective. Once again the bill was opposed only by the same law firm (R. 75, 99–100, 141–142; 104 Cong. Rec. 4788). Nevertheless, it was recommended favorably by the House Committee on Veterans' Affairs and the Senate Committee on Labor and Public Welfare in March and July 1958, respectively, and was passed on July 21, 1958. Despite a letter from these attorneys urging veto (R. 100), it was approved by President Eisenhower and enacted into law as Public Law 85–586, 72 Stat. 487, on August 1, 1958 (104 Cong. Rec. 4788, 14366, 16016).

3. *Proceedings in the Instant Cases after Plesha.* As noted above, the three present actions were brought before certiorari was granted in *Plesha*, but after the Ninth Circuit's decision in that case in favor of the

veterans. On August 1, 1957, some six months after *Plesha* was decided by this Court, petitioners and plaintiffs in *Plesha*, two of whom had intervened in the *Emmet* suit, moved for summary judgment. They demanded a mandatory injunction for payment of 90% of the refunds plus interest to those veterans who would intervene in the suit within a designated period after notification; and entry of judgment in favor of their attorneys for 10% of all amounts due, to be applied first to costs of litigation, the balance to be divided among the attorneys in accordance with their agreement (R. 47). The Government defendants in *Emmet* filed an amendment to their answer stating that the V.A. was endeavoring to make refunds and was seeking appropriate legislation over the opposition of petitioners' attorneys (R. 78–79, 88–89). The petitioners' motion for summary judgment in *Emmet* was denied by the district court on January 8, 1958 (R. 80).

Thereupon, petitioners in *Deering* and *Mabbutt* moved to transfer their actions to the District of Columbia. The motions were granted over the Government's objection that, if the actions were maintainable at all, they were supported only by the Tucker Act and hence must be tried either in the Court of Claims or in the jurisdiction in which plaintiffs resided (R. 174–179, 192–196). The cases were then consolidated for trial in the District of Columbia over the Government's jurisdictional objections.

On August 5, 1958, four days after Public Law 85-586 was enacted, the petitioners in the consolidated cases moved for a temporary restraining order to

prevent the V.A. from making any refunds to veterans under that statute (R. 84). On August 19, 1958, District Judge Youngdahl entered a preliminary injunction preventing the V.A. from disbursing more than 90% of the payments authorized by Public Law 85-586 (R. 93-94, 164 F. Supp. 563).

4. *Decisions below.* The consolidated cases were heard before visiting District Judge Boldt on October 20-22, 1958 (R. 6). The court ruled, *inter alia*, that petitioners' attorneys were entitled to 5% of the total $1,640,000 refunded to all 8,440 veterans under Public Law 85-586. This amount was to be deducted from the payments to be made to all veterans and to be paid directly to Butler, Koehler & Tausig. After reimbursing the parties and attorneys for litigation expenses, the balance was to be divided among the attorneys as they might determine (R. 145, 161).

On appeal by the Government (R. 182), the Court of Appeals for the District of Columbia Circuit reversed. That court, in an opinion by Mr. Justice Burton, held that the district court did not have jurisdiction over *Emmet* since the extraordinary remedy of mandamus is not available where, as here, an adequate Tucker Act remedy existed (Pet. 6a). In addition, the court of appeals ruled that venue in the *Deering* and *Mabbutt* actions did not lie in the District of Columbia since those actions were maintainable only by virtue of the Tucker Act, pursuant to which venue could lie only in the district of the plaintiff's residence. However, concluding that the "erroneous determination of the venue questions" by the district court did "not constitute reversible error as to

any of the parties," the court of appeals considered the cases on the merits (Pet. 11a). On the merits, the court rejected the claim of petitioners' counsel for fees from all of the veterans and petitioners' claims for pre-judgment interest.

ARGUMENT

1. Petitioners' counsel urge that they are personally entitled to a percentage of the $1,640,000 in refunds to be distributed to over 8,400 veterans under Public Law 85–586. They allege that "but for" their efforts in successfully litigating *United States* v. *Plesha*, 352 U.S. 202, no refunds would ever have been made to that large class (Pet. 76).

It is true that this Court's decision in *Plesha* antedated the Government's attempts to effect payment of refunds to over 8,400 veterans. However, this fact alone certainly does not establish the essential lawyer-client relationship which is the foundation of the right to fees. See *Jett* v. *Merchants and Planters Bank*, 228 F. 2d 156, 159 (C.A. 4), affirming *King* v. *The Fish Factory No. 1*, 132 F. Supp. 858, 862 (E.D.N.C.); *Standard Lumber Co.* v. *Interstate Trust*, 82 F. 2d 346 (C.A. 5); *Tull* v. *Nash*, 141 Fed. 557, 563 (C.A. 9); *Lamar* v. *Hall & Wimberly*, 129 Fed. 79, 82–84 (C.A. 5); *Consolidated Underwriters of S.C. Ins. Co.* v. *Bradshaw*, 136 F. Supp. 395 (W.D. Ark.); *General Finance Corp.* v. *N.Y. State Rys.*, 3 F. Supp. 975 (W.D.N.Y.) As the court of appeals noted (Pet. 13a), counsel who are influential in establishing a rule of law do not thereby gain an automatic right to compensation from all who eventually benefit from it.

Petitioners' counsel seek to avoid this conclusion by contending that their efforts in *Plesha* bring them within the rule that a party's creation, preservation or maintenance of a well-defined fund for the benefit of a group, entitles him to reasonable fees from all beneficiaries. But this line of reasoning and the Court's decision in *Sprague* v. *Ticonic Bank*, 307 U.S. 161, have no application here. There was no fund in existence at the time *Plesha* was decided.[7] Nor was any fund "created" as a direct result of the actions of petitioners' counsel in the *Plesha* case. The fact is that a "fund" for payment of refunds did not come into existence until the enactment of Public Law 85-586 in August 1958. But the creation of this fund was hardly the result of the efforts of petitioners' counsel. It was the direct result of Congressional action, taken over the protests of petitioners' counsel that such action was "unwise and unnecessary" (R. 139).[8]

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[7] The absence of any distinct fund in existence at the time of the *Plesha* decision also nullifies counsels' argument that the instant actions were "hybrid" class suits under F.R. Civ. P. 23(a)(2) and that they were thus entitled to fees from all 8,440 veterans. It is clear that a "hybrid" class action may be brought only if "the object of the action is the adjudication of claims which do or may affect specific property involved in the action." Counsel are thus forced to rely on the argument that these were "spurious class" actions under F.R. Civ. P. 23(a)(3). But it is apparent that the claims of the veterans did not present a common question of law or fact since they were subject to different defenses, *e.g.* statute of limitations, voluntary payment, and *res judicata*.

[8] From the standpoint of many veterans, the statute was indeed a necessity, for it waived defenses which otherwise would have barred their claims. See Pet. 13a.

It is this latter fact that makes doubly clear the inapplicability of the *Sprague* rule. For in that case this Court was careful to limit its holding to those "exceptional cases," involving the creation of a specific fund, where fees are shown to be required by "dominating reasons of justice." 307 U.S. at 167. No such showing can be made here. Indeed, counsels' strenuous objection to Public Law 85–586, which provides for payment without litigation and for waiver of all defenses, opposed the interests of the very class ~~from~~ for whom compensation is sought.

2. The short answer to petitioners' claim for interest is that a right to interest from the Government can only arise from "express" statutory consent, not "by implication or by use of ambiguous language." *United States* v. *N.Y. Rayon Co.*, 329 U.S. 654, 659; *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48; *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585. Not only is there no express consent here, but Congress has considered the question of awarding interest in the very situation posed by petitioners and has expressly denied it. Nothing could be more unequivocal than Public Law 85–586's provision for refund "without interest". *Supra*, p. 2.

3. Petitioners' lengthy discussion of the questions dealing with jurisdiction and venue do not require detailed response. It is sufficient to point out that notwithstanding the conclusions of the court below as to jurisdiction and venue—which we believe to be clearly

correct—the court *did* fully consider the case on the merits.*

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1960.

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*Although we have responded to the principal contentions which appear in the petition, we believe it appropriate to point out that the petition conspicuously fails to comply with this Court's rules requiring a clear and concise statement of the questions presented and of the points advanced. Rules 23(1)(c) and 23(4). This is "a sufficient reason for denying [the] petition." Rule 23(4).